LIFE CYCLES IN THE OPERATION OF CONSTITUTIONAL COURTS

– CHALLENGES AND RESPONSES

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Section III

Recent challenges in the practice of constitutional courts: AI, digitalisation, and fundamental rights protection in exceptional/emergency situations.

It is an honour to represent the Constitutional Court of Portugal at this international conference in commemoration of the 35th anniversary of the Hungarian Constitutional Court. It is a pleasure to visit the beautiful city of Budapest and to spend some time reflecting together about the life cycles of constitutional courts. My thanks to our hosts - and to the team whose hard work has made this event possible - for their warm welcome.

My own Court celebrated its 40th Anniversary in 2023. Portugal is a relatively young democracy (50 years old last year) and marking the birth of our Constitutional Court was a way both of celebrating and signalling our continuing commitment to our democratic constitution. Such occasions are themselves important milestones and opportunities for reflection and renewed commitment. I am very pleased to be able to take part in an event which I associate both

Institutionally, it is helpful to occasionally take time to stop and reflect about who we are, what we do and how we do what we do. Self-knowledge, rigour and clear sightedness in our analysis of both the challenges we face as apex courts and our responses to such challenges are an important part of the institutional dialogue and balance we aspire to achieve and maintain. They are also crucial to ensuring that we continue to do our job well.

This section is dedicated to current challenges faced by constitutional courts. There are a few, but three types of challenge to the protection of fundamental rights do stand out: **derogation from protective legal provisions in emergency situations**, **the use of AI in judicial decision-making**, and **increased digitisation of the judicial function**. These are challenges we currently face in practice and are called upon to think about together. They are likely to become increasingly acute in the coming years and they throw into sharp relief our task of securing both the protection of fundamental rights and the value of the rule of law.

I shall say a few words about the ways in which each of these three types of challenge are inviting us to think afresh about the shape and substance of democratic constitutionalism. It seems to me that the judicial branch, and apex courts of constitutional review in particular, are increasingly called upon to shape and sharpen our constitutional role. My remarks are implicitly informed by three sustaining pillars of democratic constitutionalism: limited government, access to justice and trust.

A) DEROGATION IN EMERGENCY SITUATIONS:

Let me start by the first of the three challenges to fundamental rights I mentioned a moment ago: the restrictive measures taken by government in the context of the exceptional circumstances of the Covid 19 pandemic.

The Portuguese Constitutional Court has handed down around 50 Covid 19-related judgements between 2020 and 2024. Only a handful of judgements has been handed down by the Court sitting *en banc*. Most are instances of incidental review decided by one of the Court's 3 non-specialised chambers. The judgements can roughly be divided into four broad categories:

(i) Those which address issues concerning the allocation of powers to introduce or amend criminal offences in response to emergencies (state of emergency and state of calamity) between Parliament and the Executive.

The Court has handed down a little over 10 relevant judgements which fall under this heading between 2021 and 2023. The bulk of these cases deals with the offence of disobedience.

From stating that the executive functions, in situations in which a state of exception has been declared, as an extraordinary legislator, for reasons of necessity; to stressing that the exercise of emergency powers by the executive is, in such instances, both judicially reviewable (on proportionality grounds) and subject to political control by both the President and Parliament. The Court concluded that a legal provision which increased the severity of a sanction attached to the offence of disobedience in cases of breach of an order of home confinement (which an ordinary court in Lisbon had refused to apply on unconstitutionality grounds) was not unconstitutional. **Judgements nº352/21 and 193/2022**

In another set of judgements in this first category, the Court assessed the conformity with the Constitution of a seemingly new disobedience offence introduced by the executive, in light of the rule of law requirement of the foreseeability of criminal offences (expressed in art. 29º, nº1 of the Constitution). The Court concluded that the scope of the provision was not indeterminate. Moreover, it declared that the executive had not introduced a new offence when it established that breaching the duty of confinement amounted to disobedience. By implication, the Court said, the executive had

not acted ultra vires. **Judgements nº 921/2021, 617/2022, reaffirmed more recently by the Court sitting *en banc* in Judgement nº 196/2023.**

In another judgement (**nº350/2022**), the Court specifically addressed the question whether the provisions (created by the executive in the context of a declared state of calamity – which is less severe than a declaration of a state of emergency) imposing on all retail and other service businesses the duty to close at 8:00 pm (the breach of which was an instance of the offence of disobedience), were partly or wholly innovative or whether they were (in the Court's own terminology) "a mere replication or non-innovative concretisation of another norm already in force in the legal system". In this case, the Court declared the unconstitutionality of the relevant provision stating that the executive had acted ultra vires when it introduced to the legal system "elements which were central to the definition of the" offence. **Judgement nº 350/2022**

The Court later revisited the question whether the executive had invaded Parliament's sphere of exclusive competence when it established a more severe sanction attached to acts of disobedience against legitimate legal directives. In **Judgement nº477/2022**, the Court noted that "the declaration of a state of emergency cannot affect the constitutional rules of competence and functioning of constitutional bodies" (art. 19, 7, CRP). The Court concluded that it was faced with a case of unconstitutionality for breach, by the executive, of the domain of exclusive competence of Parliament. The more general conclusion (which would resonate with any student of constitutional law), was that "the separation of powers and the delimitation of competences of the constitutional bodies constitute negative limits to the constitutional exception regime. Such negative limits remain intact throughout the officially determined period of constitutional exception." In this judgment, the first chamber ruled in a different direction to the one the Court (sitting as the third chamber) had followed in **Judgement nº 352/2021.**

Subsequently, in **Judgements nº 619 and 678/2022**, the second chamber of the Court noted that "in situations of constitutional exception, the executive is invested in the role of a true executor of prior normative choices imposed on it by primary decision-making bodies." The Court stressed that Parliament's domain of exclusive competence remains intact within a state of constitutional exception. The Court concluded that the executive has, in the exercise of its powers of execution of a declared state of emergency, no legislative power to introduce or expand criminal offences and attached sanctions. The provision under scrutiny was declared unconstitutional for breaching art.19, nº7, of the Constitution. In this judgment, too, the Court distanced itself from the ruling of the 3rd Chamber in Judgement **nº 352/2021**.

Faced with conflicting judgements on the constitutionality of the same normative provisions, the Court has sat *en banc* to judge a request for review lodged by the Public Prosecutor. The Court has

recently upheld the judgement of unconstitutionality reached by the second chamber in **Judgement nº 326/2023.**

(ii) Those which assess the conformity with the Constitution of measures which made confinement or prophylactic isolation compulsory for passengers flying into Portugal aboard certain flights.

Roughly 10 judgments were handed down by the Court, in this category, between 2020 and 2022. A significant number of the cases concerned applications for writ of habeas corpus.

The Court issued a seminal judgement under this heading (**nº424/2020**) when it declared unconstitutional a number of provisions issued by the Regional Government of the Azores islands (one of the two Autonomous Regions of Portugal) in light of the right to liberty (protected by art.27, 1 of the Constitution) and in light of art.165, 1, b) of the Constitution, which identifies areas of exclusive parliamentary competence (some of which can be delegated to the executive). The scrutinised provisions imposed a mandatory confinement period of 14 days on passengers landing in the Azores. The Court concluded that such a compulsory confinement measure amounted to a deprivation of personal freedom by authorities acting outside a declared state of emergency. It also concluded that such a measure fell under the domain of exclusive competence of Parliament, had not been delegated, and, could only have been delegated to the executive (not to the regional government of the Azores).

In four subsequent judgements, the Court established a clear line of reasoning: (i) compulsory confinement measures taken by regional health authorities amount to a restriction of the right to personal freedom protected by art.27, CRP; (ii) the specific provision under scrutiny (which established a procedure for the judicial validation of the measures of compulsory quarantine or prophylactic isolation for passengers travelling to a number of islands of the Azores from countries identified by the WHO as areas of active community transmission or with active transmission chains of the SARSCov-2 virus) did not directly affect the rights and freedoms of individuals. But the issuing of the provision by the Azorean regional government amounted to regulation within an area of parliamentary exclusive competence which had not been delegated, and, in any case, could not be delegated to the regional government. Once again, the Court declared that the Regional Government of the Azores had acted ultra vires. This reasoning formed the basis, with a few variations, for three further judgements (**nº 90/2022, 352/2022, and 510/2022**).

The Court issued its first substantive unconstitutionality judgements shortly after (**nº 464/2022 and 465/2022**). In both cases, two provisions issued by the Council of Ministers were refused application by ordinary courts within habeas corpus proceedings started by passengers on flights from Brazil who had been subjected to compulsory isolation shortly after landing in Portugal. The Court declared

that such forced confinement amounted to an actual deprivation of liberty, not merely a restriction of the personal freedom of those affected by it. The constitutional provision in point was, once again, art. 27º, CRP. The Court added that any measure entailing the deprivation of liberty of an individual must either be put forward or confirmed by a court of law. In addition to the *ultra vires* judgment it had passed in previous cases, the Court also declares the provisions invalid for directly breaching the right to liberty protected by art. 27º of the Constitution.

(iii) Those which control the conformity with the Constitution of measures establishing a mandatory confinement period for individuals under active surveillance by the health authorities.

A total of 10 judgements were handed down by the Court under this heading in 2022. One of the Court's judgments in this category was passed by the Court sitting *en banc* (**nº 334/2022**). It was decided that all 13 justices should sit in session due to the relevance and complexity of the issues at stake.

In one judgement (**nº87/2022**), the Court decided that a provision, adopted in the context of a declared state of emergency, which imposed mandatory confinement on individuals who were under the active surveillance of the health authorities was not unconstitutional. The provision at stake was not, the Court stated, "substantively innovative".

A subsequent string of judgements (including the one handed down by all 13 justices) confirms the line of argument followed in Judgement **nº 90/2022** (mentioned under the heading of category (ii)).

More substantive judgments of unconstitutionality followed, with the Court deeming particular provisions unconstitutional for breaching art.27º of the Constitution. In judgements **nº489/2022 and 490/2022**, the Court established a framework for determining which fundamental rights are specifically affected by measures of precautionary confinement and highlighted two possible approaches:

1. The relevant constitutional criterion for assessing confinement measures is the fundamental right to liberty protected by art. 27º, CRP. On this approach, the relevant distinction is the one between 'restrictions to liberty' (allowed by para 1 of art.27) and total (or partial) deprivation of liberty (exhaustively listed in paras 2 and 3).

2. An alternative approach is based on the possibility of distinguishing between different sorts of confinement measures. Those which directly affect personal freedom would fall under art. 27, whereas those specifically affecting individual freedom of movement would fall under art. 44 of the CRP.

(iv) Those which focused on the procedural effects of various Covid 19 pandemic-related measures. These can, in turn, be divided into two categories:

a) Constitutional scrutiny of provisions suspending the limitation periods of criminal and administrative offences.

There have been three judgments by the Court, handed down in 2021.

b) Constitutional control of provisions allowing the cross-examination of witnesses by videoconference in judicial proceedings.

The Court has produced one relevant judgment under this heading (**nº738/2021**).

All in all, my Court has been consistent in its approach to the various types of pandemic-related cases on which it has been asked to pass judgment. There seems to be a particular concern for the *ultra vires* character of measures adopted by the executive or by regional governments. But the Court has ventured beyond considerations of competence and comity and has also advanced substantive criteria for assessing the conformity of provisions with constitutional principles and constitutionally protected rights. The jurisprudential path followed by the Court in this sample of judgments is, for the most part, clear: the Court has been zealous in its shielding of the principles of separation of powers and comity within the Portuguese constitutional system, in the face of the unprecedented challenges of the Covid 19 pandemic.

B) THE USE OF AI IN JUDICIAL DECISION-MAKING

I would now like to make a brief note on the order of the day: the use of artificial intelligence in various areas of public life, including judicial decision-making. We are currently confronted with the fact that AI tools have considerable disruptive, as well as innovative and transformative, potential. It is no longer feasible to turn a blind eye to such a fact and to labour on the assumption that the replacement of humans by machines in various areas of life in society is a distant prospect. Not only is it not distant at all, it is unavoidable. We must therefore devote some serious thought to questions such as *what* and *how* AI tools may be used by judges and courts in the exercise of their different functions.

This question has practical implications, of course: implications of efficiency, speed, time-management, accuracy, the reduction of noise and bias in judicial decision-making. These have been explored in an already significant body of literature on judicial behaviour and decision-making: it seems clear that the use of algorithms can improve judging by offering judges access to data patterns they would otherwise not be able to detect and use in their decision-making processes. It also seems

clear that the use of AI tools to make predictions in the judicial context will become increasingly more prevalent. It is also possible to use machine learning (e.g. natural language processing tools) to study how judges work, how they reason, how they reach decisions, how they argue and justify their decisions. This can bring enormous advantages, as courts become more transparent in the way they work and better able to assess the soundness and quality of their decisions. But the widespread use of AI also has implications of value and principle which we ought to consider: are AI tools epistemically and ethically trustworthy? Should they be tasked with value-judgements and decisions involving the exercise of discretion? What are the ethical and responsibility-related implications of an answer to these questions?

Answers to such questions have implications for our views about the content and limits of the judicial role. Such views are normative views on which there is some disagreement. Such disagreement often hinges on evaluative judgments about how power should be distributed and exercised in a constitutional setting. It is a delicate task to answer such questions and regulate the field. We need to take this seriously.

C) DIGITISATION OF THE JUDICIAL FUNCTION

The issue of digitisation also raises relevant questions of value and principle worth addressing with openness and care.

The digitisation of courts suddenly took centre stage during the Covid 19 pandemic, a period during which it became crucial to find ways of securing the regular functioning of public institutions in the face of severe limitations imposed by the need to minimise contagion. The demands of social distancing forced us to be creative and proactive in using technology in an efficient, beneficial way. We relied on remote communications and the digital handling of cases (to a degree) and this allowed us to prevent an excessive, detrimental slowing of the pace of work of the Court during those critical two years.

A brief produced in 2023 by the World Bank (https://openknowledge.worldbank.org/entities/publication/0874c241-3553-46d2-80c0-05a6bb6ee96b) on the benefits of and limitations to digitising court systems, tells us that, despite an enthusiastic and effective use of technology during the pandemic, the digital divide between courts in developing and developed economies has widened in 2020 and 2021.

It seems clear to me that, as each of our courts finds a way to integrate technological tools into our structures and the work that we do, three main foundational values of constitutionalism stand out: access to justice, efficiency and transparency. All are values which can be traced back to the much

cherished virtue of the rule of law. There is evidence of a correlation between more digitised judicial systems (with good IT infrastructure) and more transparent institutions who more readily and effectively share information about what they do with the public. There also seems to be evidence of a link between digitisation and efficiency (i.e. less lengthy proceedings, lower degrees of uncertainty, lower financial burdens associated with proceedings).

This suggests that there is a relevant connection between competent use of technology and digitisation and fulfilment of the most fundamental requirements of the rule of law by courts. Optimising the way they operate by reducing complexity, financial burdens, and the amount of time it takes for a court to reach and publish a judgement leads to enhanced predictability. Digitising can simplify the way in which justice is administered, increase the productivity of courts, and facilitate access to courts by ordinary citizens. And there is no doubt that greater conformity with the requirements of the rule of law breeds trust in institutions.

My remarks have been merely suggestive of themes we all need to think and have conversations about in our respective jurisdictions, as well as at events such as this one. I am certain that a thought-provoking discussion will follow and I am grateful to be able to take part in it.

Thank you very much.